

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

In The United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14,874

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 14 1959

Joseph W. Stewart

CLERK

467

WALTER SMITH,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

INDEX

	<u>Page No.</u>
Docket Entries.	1
Indictment	2
Excerpts From Transcript Of Proceedings	3
Witnesses:	
Herbert Blanco	
Direct	3
Cross	4
William P. Butler	
Direct	4
Cross	7
Walter Smith	
Direct	11
Cross	15
David Paul	
Direct	17
Judge's Charge To The Jury	18
Verdict Of The Jury	22
Defendant's Instruction Number One	23
Judgment And Commitment	24
Affidavit In Support Of Application For Leave To Proceed Without Prepayment Of Costs	24
Notice Of Appeal.	25

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14, 874

WALTER SMITH

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE CLOSED; PARTIES - United States vs. Walter Smith; ATTORNEYS -
U. S. Attorney, Smithson; J. R. Walsh 1821 Jefferson Pl, N. W.; G.J. NO -
1008-58; CRIMINAL NO. - 836-58; CHARGE: - Vio. 26, USC, 4742a, 4744a

DATEPROCEEDINGS

1958 Sep 15	Presentment and Indictment Filed (2 Counts); Copy of Indictment given to Deft. Cert. filed.
1958 Sep 16	Affidavit for leave to proceed without prepayment of costs GRANTED and filed. MATTHEWS, J.
1958 Sep 16	ORDER APPOINTING J. Robert Walsh as counsel to defend, filed. MATTHEWS, J. (N)
1958 Sep 19	ARRAIGNED, Plea NOT GUILTY entered; DEFENDANT REMANDED to the District of Columbia Jail; Attorney J. Robert Walsh present. MATTHEWS, J. (Reporter-Byrholdt) Cert. filed.
1958 Oct 27	JURORS FROM CRIMINAL COURTS Nos. 1, 2 and 4 SWORN ON VOIR DIRE; JURY AND TWO ALTERNATE JURORS SWORN:

1958 Oct 27
(Continued)

James V. Aiken; Mrs. Mary Applebaum, Mrs. Irma Bailey, Philip Kullback, Herbert Cole, Thomas H. Corbett, William B. Courtney, Mrs. Francis Pippel, Victor Hickman, Albert J. Howard, Raymond Kennedy, Ivory Kornegay.

a.1. Mrs. Hortense Tarrar; a.2. John McAuley

Alternate jurors discharged;

VERDICT: Guilty as charged; Jury Polled;

Case is REFERRED to the Probation Officer of the Court;

Defendant REMANDED to the District of Columbia Jail;

Defendant's instruction #1, DENIED - Fiat, filed.

Attorney J. Robert Walsh present.

LETTS, J. (Reporter-Romig) Cert. filed.

1958 Dec 12

SENTENCED to imprisonment for a period of FIVE (5) YEARS on Count one; TWENTY(20) MONTHS to FIVE (5) YEARS on Count two; said sentence by the Counts to run CONCURRENTLY and to run CONCURRENTLY with sentence imposed in Criminal Case No. 373-58. Defendant REMANDED to the District of Columbia Jail; Attorney J. Robert Walsh present.

LETTS, J. (Reporter-O' Neal)

1958 Dec 12

AFFIDAVIT in support of application for leave to proceed on appeal from Judgment without prepayment of costs and for stenographic transcript of proceedings at expense of United States filed and GRANTED. LETTS, J. (N) NOTICE OF APPEAL, FILED.

1958 Dec 15

Judgment & Commitment of 12-12-58, filed. LETTS, J.

1958 Dec. 29

REFUSAL of DEFENDANT to sign election against service of sentence, filed.

[Filed September 15, 1958] Holding a Criminal Term

Grand Jury Impanelled August 28, 1958, Sworn in on September 2, 1958

The United States of America	:	Criminal No. 836-58
v.	:	Grand Jury No. 1008-58
Walter Smith	:	Vio. 26 U.S.C. 4742A, 4744A

The Grand Jury charges:

On or about August 3, 1958, within the District of Columbia, Walter Smith transferred about 15.2 grains of marihuana to Herbert Blanco, not in pursuance of a written order of said Herbert Blanco on a form issued for that purpose as provided by law.

SECOND COUNT:

On or about August 3, 1958, within the District of Columbia, Walter Smith, being a transferee of marihuana required to pay the transfer tax imposed by Section 4741a, Title 26, United States Code, obtained about 15.2 grains of marihuana without having paid such tax.

A TRUE BILL:

/s/ FRANK W. KELSEY
Foreman

/s/ OLIVER GASCH
Attorney of the United States in
and for the District of Columbia

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed February 2, 1958]

1

Washington, D. C.
Monday, October 27, 1958
10:34 a. m.

Before:

The HONORABLE F. DICKINSON LETTS,
United States District Judge

Appearances:

For the United States: Thomas A. Flannery, Esq.

For the Defendant: J. Robert Walsh, Esq.

* * * * *

8

HERBERT BLANCO, SWORN

DIRECT EXAMINATION BY MR. FLANNERY:

Q. Officer Blanco, I will ask you to keep your voice up real loud so I can hear you from way back here. What is your full name? A. Herbert Blanco.

Q. That is B-L-A-N-C-O, is it not? A. Yes, sir.

Q. You are a member of the Metropolitan Police force, are you not? A. Yes, sir.

Q. Directing your attention to August 3, 1958, were you employed as a member of the Metropolitan Police force on that day? A. Yes, sir.

11 Q. (By Mr. Flannery) About what time was it when you got to Portner and U Streets in the District of Columbia? A. About 1:00 a.m.

Q. And when you saw the defendant there what if anything happened? A. The defendant asked me if I wanted anything.

12 Q. Had you seen the defendant previously? A. Yes, I had.

Q. Did you know him by name? A. Only by Tex.

Q. Tex. All right. Now, when the defendant asked you if you wanted anything, what if anything did you do or say? A. I said yes, I did. I think my exact words were I wanted a nickel's worth, meaning I wanted five dollars' worth of marihuana.

Q. A nickel's worth. Is that a slang term used? A. Yes, it is. That is the jargon used by marihuana smokers.

Q. When you told the defendant, after he asked you what you wanted, that you wanted a nickel's worth, what happened then? A. The defendant reached into his pants pocket and pulled out four hand-rolled cigarettes and handed them to me and I pulled out a five-dollar bill, Metropolitan Police Department advanced funds, and handed the five dollars to the defendant.

Q. At that time did you give the defendant a written order form for the purchase of narcotics? A. No, I did not.

Q. Did you see any tax stamps on the cigarettes at all?

* * * * *

15 CROSS-EXAMINATION BY MR. WALSH:

* * * * *

28 Q. (By Mr. Walsh) Isn't it a fact, Mr. Blanco, that what this defendant actually sold to you were asthmador cigarettes wrapped in white paper? A. No.

* * * * *

37 MR. FLANNERY: Mr. Butler, please.

WILLIAM P. BUTLER, SWORN.

DIRECT EXAMINATION BY MR. FLANNERY:

Q. Please state your name, sir. A. William P. Butler.

Q. Where are you employed, Mr. Butler? A. I am employed by the In-

ternal Revenue Service of the Treasury Department as a chemist.

Q. How long have you been a chemist? A. Seven years.

Q. And how long have you been employed by the Bureau of Internal Revenue laboratory? A. Seven years I have been employed by the Internal Revenue laboratory.

MR. FLANNERY: Would counsel stipulate that Mr. Butler is a qualified chemist?

MR. WALSH: I think perhaps the jury ought to hear his qualifications, your Honor.

MR. FLANNERY: Very well.

Q. Mr. Butler, give his Honor and the jury somewhat of your educational background and your experience as a chemist. A. I received a bachelor of science degree with a major in chemistry from Georgetown University, a master of science degree in chemistry from George Washington University.

38 Q. When was that? A. 1950. Then I taught high school chemistry for one year. And I was then employed by the Internal Revenue Service and assigned to the analysis of narcotic drugs and illicit liquor samples and I have been so assigned from the time of my employment.

Q. And have you had many occasions to chemically analyze marihuana and narcotic drugs? A. Yes, sir, I have.

Q. And have you testified in this Federal Court as an expert in that regard? A. Yes, I have.

Q. On many occasions? A. Yes, sir.

MR. FLANNERY: I submit, your Honor, that Mr. Butler is qualified as a chemist to give an opinion.

THE COURT: Counsel care to inquire as to qualifications?

MR. WALSH: No, your Honor. We will stipulate his qualifications as a chemist.

THE COURT: Very well.

Q. (By Mr. Flannery) Now, Mr. Butler, I will show you what has been marked as Government Exhibit No. 2 for identification, this large envelope. Can you identify that? A. Yes, sir, I can. I have my initials placed in the upper

39 left - hand corner of the envelope.

Q. When did you first see that envelope? A. I first saw this envelope on the 5th of August 1958 and it was handed to me by Detective Paul of the Metropolitan Police Department.

Q. When you received the envelope what did you do with it? A. I cut the end of this envelope open and I found a small brown coin envelope contained within it. That was also sealed and I opened that coin envelope.

Q. I will show you this small brown envelope, which for the record is known as Government Exhibit No. 1 for identification. I ask you to look at it and tell his Honor and the jury whether that is the small brown envelope which you found contained in Government Exhibit 2 for identification. A. Yes, sir, it is. I have a corresponding laboratory number stamped on both Exhibit 1 and Exhibit 2.

Q. Where is that number? A. On this flap of the coin envelope and in the center upper portion of the larger lock-sealed envelope.

Q. And that number is 25412? A. Yes, sir.

Q. Did you stamp that number on the large one and then on the small one? A. Yes, sir; I did.

40 Q. Did there come a time when you opened the small envelope, Government Exhibit 1 for identification? A. Yes, sir.

Q. And what did you find contained therein? A. I found four hand-rolled cigarettes.

Q. I call your attention to four cigarettes which are contained in Government Exhibit and which are known for the record as Government, Exhibits 1-A, 1-B, 1-C and 1-D. Are those the four hand-rolled cigarettes which you discovered on August 5th? A. Yes, sir, they are. I have my initials placed on each one of these cigarettes.

Q. Did there come a time when you made a chemical analysis of the four hand-rolled cigarettes? A. Yes, sir. I took a portion of the content of each one of the four cigarettes and analyzed it and I found that each one of the four cigarettes contained marihuana.

Q. Tell the jury how you arrived at that, what you do to find out that

cigarettes contain marihuana. A. I examined the portion chemically and microscopically. There are certain typical points of identification of marihuana under the microscope.

MR. WALSH: If your Honor please -- pardon me, Mr. Butler. The witness has qualified as a chemist. We object, however, to testimony regarding what he observed under the microscope regarding an organic plant. I don't believe his qualifications as chemist entitle him to testify in that field; that he ought to be confined to his chemistry.

41 THE COURT: Objection overruled.

Q. (By Mr. Flannery) Proceed, please. A. Then a portion of each one of the cigarettes was analyzed chemically. There is what is called a Duquenois test, employing a Duquenois reagent, which will render a color with marihuana and with nothing else, and that was done in this instance and a positive color was obtained and the determination that it was marihuana was made.

MR. FLANNERY: Your witness.

MR. WALSH: The Court indulge me a moment, please?

THE COURT: Yes.

CROSS-EXAMINATION BY MR. WALSH:

Q. Mr. Butler, just to clarify the frame of reference in which you are testifying here, would you accept a distinction between a chemical analysis and a chemical test whereby an analysis means that an unknown substance is analyzed to determine all of its known components, whereas, on the other hand, a chemical test is a procedure which is applied for the specific purpose of determining the existence of one substance? Would you accept that distinction? A. Not completely, no.

42 Q. All right. Within the confines of your own discipline, do you claim that you analyze this substance contained in the Government's exhibit or that you performed tests on it? A. I analyzed the substance by performing tests.

Q. You say that you performed the Duquenois test on it? A. Yes sir.

Q. Will you give us a step by step on the Duquenois test, please. A.

A portion of the material was first extracted with petroleum ether.

Q. The next one, Mr. Butler, please. A. The petroleum ether was evaporated.

Q. And the next one. A. Then the Duquenois reagent was added to the residue.

Q. And then? A. An equal volume of concentrated hydrochloric acid was added, a volume equal to the amount of Duquenois reagent, that is. And then a three to ten minutes was allowed for a color to develop.

Q. Going to what color, sir? A. Going to a blue or a bluish purple color. A small amount of chloroform was added and the blue or bluish purple color was taken up by the chloroform.

43 Q. Was that the end of your test then, sir? A. Yes, sir; that was the end of the chemical test.

Q. Now, within that frame of reference, Mr. Butler, as a chemist, and without reference to any of your other chemical background, what is the conclusion to be drawn from the performance of this test? Not your ultimate conclusion now, but just the conclusion that results from the observations that you made in this test. A. That test will yield a positive color only with the presence of tetrahydracannabinol. And as a matter that is what the test shows, the presence of tetrahydracannabinol.

Q. All right, sir. And then you applied that conclusion to your other chemical knowledge, namely, the premise that tetrahydracannabinol is found only in marihuana? A. Yes, sir; that is right.

Q. And you came up with the conclusion, with the ultimate conclusion, that the tested matter was marihuana? A. Yes, sir.

Q. To go back again, so we are perfectly clear, this test does not of itself indicate marihuana. It indicates only the presence of tetrahydracannabinol? A. That is correct.

Q. And applying that to another premises, you come to the conclusion that you had marihuana, correct? A. Yes, sir.

44 Q. Would it be more proper to say, Mr. Butler, that instead of having marihuana that you had some part of the plant Cannabis sativa? A. Well, Cannabis sativa is marihuana.

Q. It is the whole plant? A. Well, that is merely a botanical name for the plant marihuana.

Q. So in your mind Cannabis sativa and marihuana are the same? A. They are synonymous, yes, sir.

Q. Now, in what parts of the marihuana plant, or the plant Cannabis sativa, is this substance tetrahydrocannabinol found? A. That is found in all parts of the plant with the exception of the seed.

Q. Whether the seed be sterile or nonsterile? A. Yes, sir. The seed under no conditions will contain any tetrahydrocannabinol.

Q. So the most that you concluded from your chemical examination is that some parts of the marihuana plant or the plant Cannabis sativa had been tested? A. Yes, sir.

Q. The substance that you examined contained some parts of that plant? A. Yes, Sir.

45 Q. You have not had extensive training in botany, have you, Mr. Butler?

A. Yes, sir, I believe I have.

Q. I didn't hear it as part of your qualifications. What was your training along that line? A. Well, during my undergraduate work I took a total of about 38 semester hours in the field of biology.

Q. In the field of biology? A. Yes, Sir.

Q. In your undergraduate days, you say? A. Yes, sir.

Q. You received your B. S. in chemistry, in what year? Was that 1950, or your master's? A. No. My master's was in 1950. I received my bachelor's degree in 1949.

Q. But yet your major field of endeavor was chemistry? A. I chose chemistry as my major field. I could have chosen biology if I had so desired.

Q. You say that during the seven years that you have been working for the Treasury Department that you have testified many times in proceedings similar to this, is that right? A. Yes, sir.

Q. Do you frequently testify on the basis of your microscopic tests? A. No, sir; in every instance of an offense involving marihuana I do testify that a microscopic examination was performed.

46 Q. How about with relation to the other types of cases that you handle, do you come in with only a microscopic test, say, as frequently as you come in with both?

MR. FLANNERY: Your Honor, I submit we are going somewhat far a-field.

THE COURT: Yes. Sustained.

Q. (By Mr. Walsh) Have you ever brought a microscopic test in on a marihuana case alone? A. Only having a microscopic determination?

Q. Yes. A. No, sir.

Q. Is there a peculiarity about the tetrahydracannabinol in the marihuana or Cannabis sativa plant? A. There is a peculiarity in this respect: that it is found only in marihuana. That substance does not exist in any other plant.

Q. Let me ask you this: In all cases is tetrahydracannabinol found in marihuana? A. It does not necessarily have to be in marihuana. After a certain length of time, three or four years, the tetrahydracannabinol will oxidize and will no longer be tetrahydracannabinol.

47 Q. As a chemist, Mr. Butler, would you say that your findings of the existence of tetrahydracannabinol, the result of this test, are equally consistent with your substance being the parts of the stalks of the plant as with the leaves or twigs? A. The stalks would give that test, yes; not to as great an extent as the leaves but it would give a positive test.

Q. And you didn't do any quantitative on this, did you? A. No, sir.

MR. WALSH: Nothing further, your Honor.

MR. FLANNERY: That is all.

(The witness stepped down.)

MR. FLANNERY: Your Honor, at this time the Government will offer into evidence Government's Exhibits 1, 1-B, 1-B, 1-C, 1-D, and No. 2 for identification. (sic)

MR. WALSH: No objection, your Honor.

THE COURT: The Court hears no objections, the exhibits as announced by counsel will be received in evidence.

MR. FLANNERY: The Government rests its case.

MR. WALSH: May we approach, your Honor?

THE COURT: Yes.

(At the bench:)

48 MR. WALSH: If your Honor please, I am going to move for a judgment of acquittal on the grounds that the chemist's testimony does not purport to show that the matter which he examined is beyond a reasonable doubt prohibited matter under the statute. The sum and substance of his conclusion is this: that he detected one substance which is found in all parts of the plant and that it was impossible to determine from his analysis what part of the plant he had examined, and indeed, even in speaking of his microscopic examination, to which we objected and which we were overruled, he did not say what part of the plant he examined. The statute defines the prohibited matter very carefully and I think there has been a failure of proof on the part of the Government and that the jury ought not be permitted to speculate as to what was actually under the microscope in the test.

THE COURT: Motion denied.

* * * * *

49

WALTER SMITH

* * * * *

DIRECT EXAMINATION BY MR. WALSH:

* * * * *

50

A. Walter Smith.

* * * * *

54

A. He walked up to me and said, "You got anything?" I say, "No, I don't have nothing." He say, "You know where I can get anything tonight?" I said, "No, I don't know where you can get nothing." He said, "I have got to have me something to smoke."

Q. Keep your voice up. A. He said, "Man, I have to have me something to smoke." So I said, "Well, I don't have nothing." And after that, he say, "Well, look around and see whether you can get some." So he walked away. But he

didn't go nowhere. He just walked away and stood on the corner of 14th and Portner Place, stood on the corner right by the theater. Seemed like he was waiting on someone, but he stood there and waited. He didn't move. It appeared to me that he didn't know no more about marihuana than I did, the way he kept asking me for it. So I goes upstairs in my room, which I have some Asthmador cigarettes, I smokes all the time for hay fever, sinus. And I suffer with it pretty often. And I keeps a pack handy, all the time. And I busts open two

55 Asthmador cigarettes and roll it up in some white paper, takes it back downstairs and hold my hand out and say, "Is this what you want?" after he come over. He seen me when I come back downstairs. He come over and he asked me, say, "What's happened?" just like that. I comes out and I say, "Is this what you want?" And he said to me, "Yes, that's what I want." He grabbed it. I had five of them rolled up in white paper. He say I have four. But I had five, rolled up in white paper, not marihuana; it was Asthmador cigarettes. That is what it was. It wasn't no marihuana. I haven't never possessed no marihuana in my life.

* * * * *

57 (Thereupon, at 12:30 p.m., the jury was excused until 1:45 p.m.)
(At the bench:)

58 THE COURT: Have counsel instructions?

MR. WALSH: I have one, your Honor.

THE COURT: Could I look at it please? I haven't heard any evidence that supports this.

MR. WALSH: Your Honor, my theory is that the testimony of the Government chemist himself -- I mean this is corpus delicti, the existence of the composition of this substance.

THE COURT: You can argue the testimony.

MR. WALSH: No, I mean as a matter of law he has said his chemical finding was as consistent with an authorized part of the plant as with an unauthorized part of the plant.

THE COURT: You don't say that here. That isn't what this says.

MR. WALSH: In the instruction, your Honor, I have attempted to set up a statutory definition or an instruction based on the statutory definition of the prohibited part of the plant.

THE COURT: Did you get that out of some legal decision?

MR. WALSH: The Sherman case stands for the proposition that the instruction ought to be given where there is a conflict as to what was examined. I have the Sherman case down there if your Honor would care to look at it.

THE COURT: But these facts have to be proven.

59 MR. WALSH: Had your Honor read the definition in the Code? May I point that out, please: 4761. You see, there is the definition of marihuana.

THE COURT: Yes. I can read the statute.

MR. WALSH: I intend to move the statute into evidence, your Honor, and then I wanted the instruction to buttress that. In other words, the evidence that your Honor asked for with regard to the instruction I propose will be the statute. I will ask your Honor to judicially notice and read it to the jury. And then I want your Honor to follow it with the instruction that I have requested.

THE COURT: Well, I think without request I will read the definition.

MR. WALSH: I am going to ask you to judicially notice it as part of our case.

THE COURT: Well, that is all right. That is granted and I will read the statutory definition.

MR. WALSH: Will your Honor give that instruction in those terms?

THE COURT: No.

MR. WALSH: You won't?

THE COURT: I don't think so.

MR. FLANNERY: I object to it, your Honor. I don't think the evidence justifies the giving of that instruction. I think your Honor to read the statute to the jury will be sufficient.

60 THE COURT: Then the question is whether the evidence meets the requirement of the statute.

MR. WALSH: May I show your Honor just about one paragraph out of that Sherman case? I have it right here.

THE COURT: Yes.

MR. WALSH: It is in headnote 10, your Honor. They discuss several things in the case and then they come to this. You see, there is another thing too, your Honor. The definition of marihuana as used by this chemist is not the definition as used in the statute. His testimony was explicit on that point, that marihuana and the plant *Cannabis sativa* are synonymous, and the statute does not say that. It says quite to the contrary.

THE COURT: I so read the statute. And then you are privileged to argue that his evidence does not conform to the requirement of the statute.

MR. WALSH: I thought that Sherman case said it pretty definitely. That is a recent case. Does that Sherman case change your objection?

MR. FLANNERY: No; I think the Judge read the statute to the jury, that is all he is required to do.

THE COURT: I think so.

61 MR. WALSH: But, your Honor, isn't it true that I am entitled to the instruction unless the instruction itself is wrong? I mean, unless the instruction contained some basic legal --

THE COURT: If you are trying to do the same thing there that the statute does.

MR. WALSH: Your Honor, what I am trying to do is clarify the language of the statute, and also to really get that corpus delicti instruction; because, as I conceive it, the Government has got to prove beyond a reasonable doubt that we have got taxable marihuana here. That is corpus delicti. Without that, how many transferred it to whom, there is no crime. And I think that that instruction fairly states that.

THE COURT: Doesn't your definition show that, statutory definition?

MR. WALSH: I couple it here with the reasonable doubt thing, unless you find beyond a reasonable doubt that certain of the other things --

THE COURT: We tell them that in every case.

MR. WALSH: Your Honor, I want you to realize that I have the utmost deference for your ruling, but I mean my position is this on behalf of my client. I have written an instruction which I believe is correct and I want it read that

way and of course if your Honor denies it, as you might, then that is just a horse race. But I want the record to show that as far as my client is concerned I believe he is entitled to that and that is what I want him to have, in those words.

THE COURT: You are entitled to have the record on your point.

MR. WALSH: I'd like a little more, your Honor.

(Laughter.)

THE COURT: But what does it add to the statutory definition?

MR. WALSH: Your Honor, the statutory definition is very hard to understand. I was deep in this case and had to read it a half a dozen times before I understood it. The way they pin these salts and oils and stuff onto the other clauses, it is just a maze.

THE COURT: You use the same language here.

MR. WALSH: No; I kind of grouped them together a little differently so the people can understand we are talking about the stalks and then the derivatives of the stalks and so forth.

MR. FLANNERY: I think if your Honor would read the statute and give your usual definition of "reasonable doubt," the jury will have no difficulty in this case.

THE COURT: I rather think so. However, during the noon hour -- Have you got a copy?

MR. FLANNERY: Yes, sir.

MR. WALSH: Your Honor will note on it whether it is going to be given or denied for the record?

63 THE COURT: I will let you be informed about that before you argue.

(Thereupon, at 12:45 p.m. a recess was taken.)

* * * * *

64 CROSS EXAMINATION BY MR. FLANNERY:

* * * * *

65 Q. Now, in June of 1958, you were convicted, were you not, in this District Court here for procuring women for purposes of prostitution; isn't that correct?

A. I pleaded guilty to it, sir.

* * * * *

73 A. After I got that ten dollars from him, next time I seen him it was on the corner of Portner and U.

Q. What time? A. Eight o'clock.

Q. And what happened between you and him at that time? A. He asked me again where could he get some marihuana.

Q. What did you say? A. I said I don't know. He said, "You know where I can get something? You can get some." I said, "I don't know where you can get none." He said, "I got to have some. I got to get some. Anything." So he walked away on the corner and stood up there. He didn't go away. Just stood up there. And I walks up the stairs to my room and bust open two Asthma-dor cigarettes and I roll them up in white paper and brought it back downstairs and then when he seen me come back downstairs he run over and stopped me and talked to me.

Q. I show you Defendant's Exhibit 1, this box and its contents. Is that the type of cigarette you say you busted open? A. Yes, sir, I busted open.

74 Q. Tell me what you did. You mind busting one of those open? A. Just like that.

Q. What did you do then? A. I taken some top paper, you know what you buy for --

Q. For what? A. Top paper.

Q. Top paper? A. Yes, sir. You can buy it at the drug store. Top paper. Cigarette paper that you can roll cigarettes with.

Q. Cigarette paper? A. Yes, sir. Cigarette paper.

Q. White, thin paper? A. Yes, sir.

Q. What did you do with that? A. Well, I roll it up and roll up five of them.

Q. You rolled up five of them in white paper, you say? A. Yes, sir.

Q. And then what did you do? A. I taken them back downstairs and as I got on the corner there he came over there where I was. He say, "You got anything yet?" Each time he see me he would ask me. That was his main word every time he see me, did I have anything. So when he come asked me this time,

he say, "You got anything?" I stuck my hand out, I said, "Is this what you want?" like that. But it appeared to me he didn't know anything more about marihuana
 75 than I did. I thought he was going to take it. When I give it to him he taken it and gave me five dollars.

* * * * *

78 MR. WALSH: Your Honor please, at this time I would ask the Court to take judicial notice of Title 26, United States Code, Section 4716 (2) (sic), and ask that I might read it into the record.

THE COURT: That is a matter of law which the Court intends to read to the jury.

MR. WALSH: Very well, your Honor. May it be read at this time as a part of our case?

THE COURT: Oh, no. It is a part of the law of the case which the Court will present in the charge to the jury.

MR. WALSH: Very well, your Honor.

* * * * *

79

DAVID PAUL

recalled by the Government in rebuttal, further testified as follows:

EXAMINED BY MR. FLANNERY:

Q. For the record, you are Detective David Paul? A. I am, sir.

Q. You have previously been sworn? A. Yes, I have.

Q. You participated in the arrest of this defendant, did you not, Detective Paul? A. I did, sir.

Q. When and where was that? A. It was about 5:45 a.m. in the morning on the August 7th (sic) of this year at 15th and U, like in Union, Street, Northwest.

Q. Did there come a time when you took the defendant to police headquarters? A. Yes.

Q. What time did you arrive there? A. He was booked about 5:51, and I would say around 6:00 a.m. in the morning or shortly afterwards.

Q. Did there come a time when you questioned this defendant in connection with this case? A. Yes, sir.

80 Q. What time was that? A. Shortly after 6:00 a.m. that morning, sir.

Q. How long after his arrest would that be now? A. I would say within a half hour afterwards.

Q. Within a half hour? A. Yes, sir.

Q. Now, did you ask the defendant whether or not he used marihuana?

A. Yes, sir; he was asked that.

Q. What did he say? A. He stated that he had used marihuana previously.

Q. He said that he had used marihuana previously? A. Yes, sir.

* * * * *

MR. WALSH: May we approach, your Honor?

THE COURT: Yes.

(At the bench:)

MR. WALSH: Two things, your Honor. I still think that I ought to be able to read in that definition as part of that case.

THE COURT: I am going to read it as part of the case. Part of the law of the case.

81 MR. WALSH: And then does your Honor have a ruling on the instruction?

THE COURT: Yes. That will be denied.

MR. WALSH: Very well. The record, I believe, discloses my position.

THE COURT: The record discloses the position and this shows it.

MR. WALSH: That is all I have.

(Counsel returned to trial tables.)

* * * * *

91 THE COURT: Ladies and gentlemen: The defendant, Walter Smith, stands charged in a two-count indictment.

The first count charges that on or about August 3, 1958, within the District of Columbia, the defendant Walter Smith transferred about 15.2 grains of marihuana to Herbert Blanco, not in pursuance of a written order of said Herbert Blanco on a form issued for that purpose as provided by law.

The second count charges that on the same day, August 3, 1958, within the District of Columbia, the defendant Walter Smith, being a transferee of marihuana, required to pay the tax, the transfer tax, imposed by Section 4741(a),

Title 26, United States Code, obtained about 15.2 grains of marihuana without having paid such tax.

92 This seems an appropriate time to read to the jury another statute which defines marihuana.

The statute provides that the term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

The first count of the indictment which I have read to the jury charges a violation of a statute which I shall now read. It provides as follows:

"It shall be unlawful for any person, whether or not required to pay a special tax and register under Section 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

The second count of the indictment charges the violation of still another statute, which provides as follows:

93 "It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 4741 (a)."

To this indictment, and to each count thereof, the defendant has interposed a plea of not guilty.

You are told that in the first instance there is a presumption in law that the one who stands accused is not guilty of the offense with which he is charged. This presumption of innocence should prevail in the minds of the jury in such a way as to cause the jury to find the defendant not guilty unless from all of the evidence of facts and circumstances shown in the case the jury are convinced beyond a reasonable doubt that the defendant is in truth and in fact guilty.

The burden of proof rests upon the Government, which means that before this jury will be warranted in finding the defendant guilty the Government must prove that guilt and each essential element of the offense charged to the satisfaction of the jury beyond a reasonable doubt. And this burden of proof rests
94 upon the Government as to each and every issue of the case and continues upon the Government from the beginning to the end of the case.

A reasonable doubt means such a doubt as will leave the juror's mind after a candid, impartial investigation, comparison and consideration of all of the evidence in the case, and of all the facts and circumstances shown in the evidence so undecided that the juror is unable to say that he or she has an abiding conviction of the defendant's guilt. It is such a doubt as in the graver and more important transactions of life would cause a reasonable and prudent person to hesitate pause. (sic) If the evidence fails to come up to this standard, it is such as would warrant such a doubt, and if you entertain such a reasonable doubt of the defendant's guilt, the law requires that you give the defendant the benefit of that doubt and acquit him.

The words "reasonable doubt" must be given their usual and ordinary meaning. The doubt must not be trivial, whimsical, should not be based upon groundless conjecture and should not be sought after; for when it is such a doubt as the law recognizes, it comes fairly and naturally into the minds of the jury and arises out of the evidence or from a lack of necessary evidence. It must be a doubt that appears to you to be reasonable in the circumstances of the case as shown by the evidence.

95 Evidence has been received that the defendant has been previously convicted of crime. Such evidence was not received as bearing upon the issues of

the case except that you may consider and weigh such evidence in connection with all other evidence and all the facts and circumstances shown in the case in determining how much weight and credibility you will accord the testimony of the defendant who took the stand as a witness in his own behalf.

The law makes this jury the sole judges of the credibility of the witnesses, and of the weight you will accord the testimony given by them. You should give to each witness that degree of credit and effect which in your honest judgment you think it ought to have. In coming to your conclusion as to what weight should be accorded the testimony of any particular witness, you may, and properly should, take into consideration insofar as you able to do so (sic) the manner and appearance of the witness when on the stand, and whether the testimony of the witness be frankly and honestly given; also, what if any interest or lack of any interest a witness may have in the outcome of the case and whether on that account the witness has colored in any way the testimony related to this jury.

If you find that any witness has knowingly testified falsely with respect to any matter material to the issues of the case and concerning which the witness might not reasonably have been mistaken, you may, if you wish, disregard all or any part of the testimony of such witness.

96 The jury will take the case. You will retire to your jury room and deliberate upon your verdict. I suggest that as orderly procedure you first agree upon a foreman. Let that foreman be your presiding officer. Each member of this jury has the right to be fully heard in discussing the issues and the evidence of the case, and it is the duty of the foreman to see that each member of this jury is protected in that right.

Your verdict will be upon each count of the indictment. When you return to the courtroom you will be asked for that verdict. Let it be announced by your foreman. If you find that the Government has carried the burden of proving the essential elements as charged in the indictment, to your satisfaction beyond a reasonable doubt, then your verdict upon that count will be guilty as charged. If you find that the Government has failed to carry that burden of proof as to any essential element, then your verdict upon that count will be not guilty.

You will then determine upon your verdict as to the second count and if you find that the Government has proved to your satisfaction each essential element of the offense charged in that count to your satisfaction beyond a reasonable doubt, then your verdict upon the second count will be guilty as charged. If you find
 97 that the Government has failed to so prove each and every essential element charged in the second count of the indictment, then your verdict upon that count will be not guilty.

Do counsel have suggestions?

MR. FLANNERY: No, sir.

(At the Bench:)

MR. WALSH: If your Honor please, I am not satisfied that the corpus delicti has been covered fully enough in your Honor's charge. I think that the elements of the charge ought to be repeated to the jury, including the fact that the marijuana must be as defined in the statute.

And I further ask that, since your Honor has denied my instruction on the definition, that your Honor at least send in a copy of U.S.C.A. so that they can refer to that thing. They can't conceivably remember what that definition is.

THE COURT: I think it is covered.

MR. WALSH: Very well, your Honor.

(Counsel returned to trial tables.)

* * * * *

98 (At 3:36 p.m. the Court reconvened.)

THE COURT: Let the record show that the defendant is present in court accompanied by his counsel.

Call the jury.

(The jury then returned to the courtroom, and the following occurred:)

THE CLERK: Mr. Foreman, has the jury reached a verdict?

THE FOREMAN: We have.

THE CLERK: What say you as to the defendant Walter Smith on count one?

THE FOREMAN: Guilty.

THE CLERK: Count two?

THE FOREMAN: Guilty.

THE CLERK: Members of the jury, your foreman says that you find the defendant Walter Smith guilty as charged and that is your verdict so say you each and all?

(Yes.)

MR. WALSH: Ask that the jury be polled, if your Honor please.

THE COURT: Yes.

* * * * *

100 **THE CLERK:** The jury has been polled and all concur and find the defendant Walter Smith guilty as charged.

THE COURT: The Court receives the verdict of the jury. The defendant will be committed for sentence.

[Filed October 27, 1958]

DEFENDANT'S INSTRUCTION NO. ONE

YOU ARE INSTRUCTED that the Congress has very carefully defined marihuana, the alleged obtaining and transfer of which by the Defendant forms the basis for the prosecution of this case.

The following parts of the marihuana plant, or *Cannabis Sativa*, as it is more properly called, are not subject to tax, and may be obtained and transferred without criminal consequences:

1. Mature stalks of the plant, and any compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom).
2. Fiber produced from such mature stalks, and any compound, manufacture, salt, derivative, mixture, or preparation of such fiber.
3. Oil or cake made from the seeds of the plant, and any compound, manufacture, salt, derivative, mixture, or preparation of such oil or cake.
4. Sterilized seeds of such plant, which are incapable of germination.

Accordingly, unless you find beyond a reasonable doubt that the Defendant, Walter Smith, obtained and transferred to Officer Blanco parts of the plant, *Cannabis Sativa*, other than those I have just mentioned, you must find the Defendant not guilty.

Shurman against U. S. 219 F. 2d 282 (C.C.A. 5, 1955).

[Filed December 15, 1958]

JUDGMENT AND COMMITMENT

On this 12th day of December, 1958, came the attorney for the government and the defendant appeared in person and by counsel, J. R. Walsh, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

VIO. Title 26, Sections 4742a, 4744a, U. S. Code

As charged, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Five (5) years on Count One; Twenty (20) months to Five (5) years on Count Two; said sentence by the Counts to run concurrently and to run concurrently with the sentence imposed in Crim. No. 373-58.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ F. Dickinson Letts

United States District Judge.

[Filed December 12, 1958]

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO PROCEED WITHOUT PREPAYMENT OF COSTS

I, Walter Smith, being first duly sworn according to law, depose and say that I am the DEFENDANT in the above-entitled cause, and, in support of my application for leave to proceed in said cause without being required to prepay

fees or costs, state as follows:

1. That I am a citizen of the United States.
2. That because of my poverty I am unable to pay the costs of said suit or action.
3. That I am unable to give security for the same.
4. That I believe I am entitled to the redress I seek in said suit or action.
5. That the nature of my cause of action is briefly stated as follows:

Appeal from conviction for violation of

26 USC 4742(a)

26 USC 4744(a)

/s/ Walter Smith

SUBSCRIBED and SWORN to before me this 10th day of November, 1958.

/s/ J. E. Ottes,

Notary Public, D. C.

Let the applicant proceed on appeal without prepayment of costs, and be furnished the stenographic transcript of proceedings at expense of United States.

/s/ F. Dickinson Letts

JUDGE

[Filed December 12, 1958]

NOTICE OF APPEAL

Name and address of appellant: Walter Smith, 2011 Portner Place, N.W.,
Washington, D. C.

Name and address of appellant's attorney: J. Robert Walsh, 1821 Jefferson
Place, N. W., Washington 6, D. C.

Offense: Violation 26 USC 4742(a); 26 USC 4744(a)

Concise statement of judgment or order, giving date, and any sentence:

Sentenced to imprisonment for a period of 5 yrs. on Ct. 1; 20 months to
5 years on Ct. 2, Said sentence to run concurrently by the counts and to
run concurrently with sentence imposed in Criminal No. 373-58, filed
12-12-58. LETTS, J.

Name of institution where now confined, if not on bail

District of Columbia Jail

I, the above named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

/s/ Walter Smith
Appellant

/s/ J. Robert Walsh
Attorney for Appellant.

Date: November 10, 1958.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

NO. 14,874

FILED FEB 27 1959

Joseph W. Stewart

CLERK

WALTER SMITH,

APPELLANT

vs.

UNITED STATES OF AMERICA,

APPELLEE

694

BRIEF FOR APPELLANT

J Robert Walsh,
Counsel For Appellant,
Appointed Trial Counsel By
United States District Court
1821 Jefferson Place, N. W.
Washington 6, D. C.
District 7-4088

QUESTIONS PRESENTED

1. Whether there was sufficient evidence, at the close of the government's case, to permit the case to go to the jury on the issue of whether prohibited marihuana had been received and transferred by the defendant.
2. Whether the defendant was entitled to have the statutory definition of marihuana read to the jury as a part of the evidence in his case.
3. Whether the defendant was entitled to his requested instruction relating to the government's burden of proof with reference to the statutory definition of marihuana.

INDEX

Questions Presented.....	i
Index.....	ii
Table of Cases.....	ii
Jurisdictional Statement.....	iii
Statement of the Case.....	iii-iv
Statutes Involved.....	v-vi
Statement of Points.....	vi
Summary of Argument.....	vii-viii

Argument

I. Insufficiency of evidence.....	1.-10
and failure to grant judgment of acquittal.	
II. Exclusion of evidence.....	10-13
and denial of instruction.	

TABLE OF CASES

AZ Din vs. United States, 232 F2 283.....	10
Francis vs. United States, 239 F2 560.....	6
Lehman vs. District of Columbia, 19 App DC 217.....	8
Levine vs. United States, No. 14,442, 104 US App DC ____; 261 F2 747.....	13
Peckham vs. United States, 93 US App DC 136; 210 F2 693.....	10
Shurman vs. United States, 219 F2 282.....	5
State vs. Abbey, 29 Vt. 60; 67 Am Dec 754.....	10
State vs. He Quan Chan, 113 Or 168.....	9
United States vs. Cook, 17 Wall. 168; 21 Leo 538.....	9
United States vs. Shelley, 229 US 239; 33 Sct 635; 57 Leo 1167.	2
United States vs. Stallsworth, 193 F2 870.....	3
Williams vs. United States, 78 US App DC 147; 138 F2 81; 153 ALR 1213.	10
Young vs. Territory, 8 Okla 525; 58 P 724.....	8
Anno.: 153 ALR 1218.....	8
5 Wigmore on Evidence.....	1

JURISDICTIONAL STATEMENT

This Court has jurisdiction by virtue of the provisions of 28 USC 1291, 1294, based upon Notice of Appeal timely filed (JA 25) following a judgment of conviction rendered by the United States District Court for the District of Columbia. (JA 24)

STATEMENT OF THE CASE

Appellant was convicted (JA 24) on both counts of a two-count indictment charging him with obtaining marihuana without paying the transfer tax thereon, and transferring that marihuana not in pursuance of a written order as required by law. (JA 2, 3).

At the trial, the government produced three witnesses whose combined testimony established that the defendant transferred some cigarettes to an undercover policeman, and that those cigarettes were ultimately turned over to the fourth government witness, an Internal Revenue Service chemist.

The only evidence as to the content of the cigarettes transferred by the defendant was that of the chemist. The chemist testified that his only chemical test was to determine the presence of tetrahydrocannabinol (JA 7, 8); that he found tetrahydrocannabinol in the substance which he tested, and that it is found only in the marihuana plant and in all parts thereof, except the seeds (JA 8, 9). He testified that "marihuana" is synonymous with "Cannabis sativa". (JA 9).

At the close of the government's case, the defendant moved for a judgment of acquittal, and the motion was denied. (JA 11).

During the course of his case, the defendant sought to have the statutory definition of marihuana judicially noticed and read to the jury, and this evidence was excluded by the Court. (JA 17).

Defendant submitted a written instruction (JA 23) embodying the statutory definition of marihuana and the government's burden of proof with reference thereto. This instruction was denied by the Court. (JA 18) .

The jury returned a verdict of guilty on both counts (JA 23) . Judgment was entered on the verdict (JA 24) , and this appeal followed (JA 25) .

STATUTES INVOLVED

26 USC 4742 (a) ; Act, Aug. 16, 1954, C. 736, 68 A Stat. 560

(a) GENERAL REQUIREMENT. --It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 USC 4744 (a) ; Act, Aug. 16, 1954, C. 736, 68 A Stat 562, as amended by Act, July 18, 1956, C. 629, Title I, S. 101, 70 Stat 567.

(a) PERSONS IN GENERAL. --It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a) --

- (1) to acquire or otherwise obtain any marihuana without having paid such tax, or
- (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741 (a) . As amended July 18, 1956, c. 629, Title I, 8101, 70 Stat. 567.

26 USC 4761 (2) ; Act, Aug. 16, 1954, C. 736, 68 A Stat 565.

(2) MARIHUANA. --The term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds

thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom) , fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

STATEMENT OF POINTS

1. Because the government failed to show that the substance transferred by the defendant was a prohibited part of the plant *Cannabis sativa*, within the statutory definition of marijuana, there was insufficient evidence to go to the jury, and defendant's motion for judgment of acquittal at the close of the government's case should have been granted.

2. The statute containing the definition of marijuana was competent, relevant, and material evidence in the defendant's case, and the trial court erred in refusing to permit it to be read to the jury as part of the defendant's case.

3. The instruction requested by the defendant relative to the statutory definition of marijuana and the government's burden of proof with reference thereto was a correct statement of law and in accord with the defendant's theory of the case. Denial of that instruction by the trial court was error.

SUMMARY OF ARGUMENT

I. The defendant was indicted and tried for receiving and transferring marihuana. Marihuana is defined by statute as meaning only certain parts of the plant *Cannabis sativa*. All of the government's evidence relating to the nature of the substance transferred was given by the chemist. The chemist understood marihuana to be synonymous with *Cannabis sativa*. His testimony showed only that he had tested some part of the plant *Cannabis sativa*, other than the seeds thereof. His testimony showed also that his conclusion was equally consistent with the tested substance being permissible or proscribed marihuana. On this state of the evidence, there existed a logical hiatus which the jury could bridge only by speculation or misunderstanding. The trial court should have withdrawn the case from the jury and granted the motion for judgment of acquittal.

II. The statute defining marihuana defined physical matter which comprised a part of the corpus delicti in the case. Such physical matter was a fact which could be proved by expert testimony in the absence of a statutory definition. The statutory definition merely obviated the need for, and precluded the admission of, such other method of proof. Defendant had built the strategy of his case around the admission of that definition into evidence following the chemist's testimony, and the exclusion of the definition by the trial court was error.

Defendant submitted an instruction relative to the statutory definition of marihuana and the government's burden of proof with reference thereto. The admission of the statutory definition and the granting of the requested instruction were designed as a cohesive whole to point up to the jury the manifest inadequacy of the government's evidence on the substance tested by the chemist. This was

the defendant's theory of the case as it went to the jury, after denial of the motion for judgment of acquittal. The instruction was legally sound and in accord with the evidence of the case. The trial court's refusal to grant it was error.

ARGUMENT

I. In light of the statutory definition of marihuana, the government's evidence was insufficient, as a matter of law, to prove that the crimes alleged in the indictment were actually committed. The trial court should have withdrawn the case from the jury, and granted defendant's motion for judgment of acquittal at the close of the government's case.

In order to carry its burden of proving corpus delicti in the case at bar, the government was required to adduce evidence from which the jury could logically conclude, beyond a reasonable doubt, that the substance possessed and transferred by the defendant was marihuana. The term "marihuana" is defined in Act of Aug. 16, 1954, C. 736, 68 A Stat. 565; 26 USC 4761 (2).

The only evidence offered by the government to prove that the substance in question was marihuana was the testimony of the Internal Revenue Chemist, Mr. William P. Butler, (JA 4-10). Accordingly, the testimony of the chemist must be viewed against the backdrop of the statutory definition of marihuana in order to determine the validity of our contention herein.

Though the chemist's testimony occupies 10 pages of the trial transcript (JA 4-10), it can fairly be summarized as saying that the tested substance contained some part of the plant cannabis sativa, other than the seeds thereof. From this testimony, the trial court permitted the jury to conclude beyond a reasonable doubt that the substance tested by the chemist was statutory marihuana. This was error.

The chemist testified as follows: 1. That his only chemical analysis consisted of the performance of the Duquenois test (JA 7, 8);

2. That the Duquenois test indicates only the presence of tetrahydrocannabinol (JA 8) ; 3. That tetrahydrocannabinol is found only in marihuana (JA 8) ; 4. That tetrahydrocannabinol is found in all parts of the marihuana plant, except the seeds thereof (JA 9) ; 5. That his chemical findings were as consistent with the conclusion that the substance tested was part of the stalks of the plant as with the conclusion that the substance tested was the leaves or twigs of the plant (JA 10) . It is important to note, also, that even though the chemist stated on direct examination that the substance was marihuana (JA 6, 7) , it appears conclusively from his cross-examination that when he used the word "marihuana" he did not ascribe to it the meaning contained in the statute (JA 9) .

The case at bar is a criminal prosecution for violation of a taxing statute. As stated in U. S. vs. Shelley, 229 US 259; 33 Sct 635; 57 Led 1167 (1913) ; the prohibition can be no more extensive than the taxing clause. The burden was upon the prosecution to show that there was a receipt and transfer by the defendant of a substance subject to tax. Proof that the defendant received and transferred a substance, which may or may not be subject to tax, did not discharge that burden.

Apparently, it was the view of the government and the trial court that the chemist's testimony that he found tetrahydrocannabinol, and that tetrahydrocannabinol is contained only in the marihuana plant established the tested substance as marihuana, within the statutory definition. It would seem that the Congress did not share this view. The Federal Narcotic Control Act of 1956 amended both the Marihuana Tax Act here at issue and the Act of Feb. 9, 1909, C. 100, S. 2 (i) ; 21 USC 176. The latter Act was amended by providing severe penalties for the sale of heroin to minors. Significantly, a new section (Act July 18,

1956, C. 629, Title I, S. 107, 70 Stat 571; 21 USC 176 b) was added defining heroin as follows:

For the purpose of this section, the term "heroin" means any substance identified chemically as Diacetyl Morphine or any salt thereof.

The Duquenois test used by the chemist in our case has been used for over twenty years. However, the Congress has not seen fit to say that marihuana means any substance identified chemically as tetrahydrocannabinol. Certainly, if the government's contention were regarded as correct, the Congress would have included such language in the 1956 amendment.

Our contention in this regard is that the government had the burden of introducing evidence that the substance examined by the chemist contained parts of the plant cannabis sativa other than those parts which are excepted under the statutory definition.

While we have been able to find no case precisely determining this point, there are several cases which indicate that other courts have required this burden from the government. In the case of United States vs. Stallworth, 193 F2 870 (CCA 7, 1951), the appellant contended that the government had failed to prove that the substance examined by the Internal Revenue chemist was marihuana within the statutory definition. The appellate court rejected this argument on the basis, however, that the chemist had testified that the substance examined by him contained parts of the plant other than the stalks, stems, fibers and seeds. The following paragraph is quoted from that case, 193 F2d

at page 873.

Mr. Endriz (chemist) testified that, based upon his experience and training as a chemist, he was of the opinion, from his examination of the substance found in the defendant's possession, that the substance was marihuana. His examination consisted of one physical microscopic test and four different chemical tests. He said that the purpose of these various tests was to corroborate each other, which they did in this case. This expert witness also testified that his examination and tests showed that the substance contained material other than the stalks, stems, fibers, and seeds of the plant cannabis sativa: that it did contain the leafy tops of the plant. The defendant offered no evidence to contradict the testimony of Mr. Endriz on this question.

An examination and a consideration of the entire testimony of the expert witness convinces us that it furnishes a reasonable basis for the jury's finding that the substance in question was marihuana within the statutory definition. It follows then that this finding of the jury may not be disturbed.

In this case an instruction was requested by the defendant and granted by the Court to the effect that in order to find the defendant guilty the jury must find that the substance found in the defendant's possession was marihuana as defined by the statute. The instruction also contained a verbatim recital of the statutory definition of marihuana. The Court concluded on this basis that

since the chemist had testified that he had examined parts of the plant cannabis sativa other than those parts which are excepted by the statute, and since the instruction contained the statutory definition of marihuana, that the government had carried its burden of proof and that the case properly went to the jury for their consideration.

As above indicated, in the case at bar, the government produced no evidence whatsoever from which the jury could properly conclude that the chemist had examined parts of the plant cannabis sativa other than those which are excepted by the statutory definition.

The case of Shurman vs. United States, 219 F2, 282 (CCA 5, 1955), is perhaps almost entirely in point with the case at bar on this question; although the case was reversed and sent back for a new trial on the basis of venue, and on the basis of the denial of an instruction on the statutory definition of marihuana. The reason that the appellate court considered the denial of the instruction prejudicial is most persuasive in the case at bar. The following language of the Court is quoted from 219 F2d at page 292

The chemist testified that he made both a chemical and microscopic test and found resin present. The fact that he also found present particles of the plant cannabis sativa that are excluded from the definition, did not prevent the jury from considering whether there was also present resin from the plant; for them to do this, they needed an appropriate instruction from the Court.

From this language it would appear that the government chemist in the case testified to essentially the same thing as the government chemist in the case at bar; namely, the finding of tetrahydrocannabinol in the substance tested. His additional testimony was to the effect that he examined some parts of the plant that are excluded by the statutory definition. The Court's conclusion was that based upon this testimony the jury could not properly determine whether the resin, or tetrahydrocannabinol, which he found came from the excluded portions of the plant or from the prohibited portions of the plant. Accordingly, the Court determined that the defendant was entitled to an instruction setting out the statutory definition of marihuana, and to the effect that the government chemist must have made his analysis with due regard for the statutory exclusion of certain parts of the marihuana plant from the statutory definition of marihuana. In the case at bar, it is clear that the government chemist did not make his analysis with reference to the statutory definition of marihuana. Indeed, it is clear that the government chemist did not know the statutory definition of marihuana. (JA 9) .

Appellant's contention that the government has the burden of showing the possession and transfer of prohibited parts of the marihuana plant under the statutory definition is further buttressed by the case of Francis vs. the United States, 239 F2, 560 (CCA 10, 1956). In that case the defendant was apprehended with the seeds of the marihuana plant in his possession. That the Court recognized the validity of our contention is illustrated by the following language at the very beginning of the opinion at 239 F2d at page 560 and 561.

Grounds for reversal urged are that the evidence is insufficient to show that the appellant knowingly had in his possession the marihuana seeds discovered in the car he was driving, and that the evidence was incompetent to show that the seeds were capable of germinating which they must be to be within the statutory definition of marihuana, 26 USC 4761 (2) .

The proof offered in the case is stated by the Court as follows:

Klayder (chemist) testified that he determined the seeds to be marihuana. He removed 10 seeds from the envelope, planted them, and within three and one-half days, four had sprouted. He resealed the envelope and returned the seeds to Ford, who in turn returned them to Marsh.

There the Court recognized that the government had the burden of proving that the seeds were capable of germination in accordance with the statutory definition. According to the government's theory of the case at bar, such proof would not be necessary, or so it would seem from the type of testimony offered by the government's chemist.

The Court upheld the conviction in this case as against the contention that the chemist's testimony that the seeds grew was not the best evidence. Implicit in the Court's opinion, however, is the recognition of the burden on the government to prove that the seeds were fertile.

As against the contention that there was a shift in the burden of going forward once the government showed that some part of the marihuana plant had been transferred, cases

determining the sufficiency of indictment are enlightening, on the premise that what is required to be pleaded must be proved.

In 1902, this Court, in passing upon the sufficiency of an information in the case of Lehman vs. District of Columbia, 19 App. DC 217, stated the following proposition, at P. 224:

It is therefore necessary and proper to negative apparent exception and immunity in so far only as such exception or immunity enters into the description of the alleged offense; but it is not necessary to anticipate excuse by alleging that there is no ground for such excuse. We might well illustrate the proposition if we supposed a statute wherein the prohibition was upon the sale of all intoxicating liquors, except wine. Evidently an information or indictment to the effect that the accused person sold intoxicating liquors, without negating the fact that it was wine that was sold, might well be held insufficient, wherever in the statute the exception appeared; for the offense under the statute was not the sale of intoxicating liquors, but the sale of such liquors other than wine. The definition of the offense might be held incomplete without the exclusion of the exception by negative averment.

In the extended annotation in 153 ALR 1218, at P. 1220, the proposition is stated that where a negative or exclusion is integral in the enacting clause descriptive of a crime, it must be covered in averments of an indictment and proved by the prosecution.

So, in the case of Young vs. Territory, 8 Okla 525; 58 P. 724 (1899); where a statute defined rape as "an act of sexual intercourse

accomplished with a female, not the wife of the perpetrator," an indictment was insufficient for failing to allege that the defendant was not the husband of the prosecutrix. The court reasoned that the negative phrase was "so incorporated with, and such a part of the definition or description of the offense, as that the crime cannot be described and omit such clause."

Similarly, in State vs. He Quan Chan, 113 Cr 168 (1925), a statute prohibited the possession of morphine, and made certain exceptions including preparations sold without prescription and containing less than one-fourth grain of morphine. In striking down an indictment which negated the prescription element, but was silent as to the morphine content, the Court held that the quantity of the morphine was a part of the description of the statutory offense, and that under the indictment as drawn, the defendant might be guilty or innocent of the crime charged.

In deciding the He Quan Chan case, the Oregon court relied upon the opinion of the United States Supreme Court in United States vs. Cook, 17 Wall, 168; 21 Led 538 (1872), wherein it was stated:

Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception.

The Supreme Court's holding in the Cook case was substantially a reaffirmation of the doctrine of the earlier case of

State vs. Abbey, 29 Vt. 60; 67 Am Dec 754 (1856) .

The burden of the government has been even further extended in very recent times in the case of AZ Din vs. United States, 232 F2, 283 (CCA 9, 1956) , where, in a prosecution under the Cpium Poppy Control Act, a conviction for purchasing poppy seeds was reversed on the ground that the government had failed to prove that the purchase was made within the three-year statute of limitations period.

In this connection, decisions of this Court in cases such as Williams vs. U. S. 78 US App DC 147; 138 F2 81; 153 ALR 1213 (CCA DC, 1943) and Peckham vs. U. S., 93 US App DC 136; 210 F2 693 (CCA DC 1953); relating to the exception contained in the D. C. abortion statute are distinguishable. Such cases refer to the circumstances under which an otherwise criminal act is committed, rather than to a definition of the gravamen of the offense.

II. The trial court erred in refusing to permit the statutory definition of marihuana to be read to the jury as part of the defendant's evidence; and in refusing to grant defendant's requested instruction relative to the defendant's theory of the case.

The statute containing the definition of marihuana (26 USC 4761 (2)) was vital, competent, relevant, and material evidence in the case. If there were no statutory definition of marihuana, any competent testimony produced by the government or by the defense going to the definition of marihuana would have been admissible. The statutory definition at once obviated the necessity for, and precluded the admission of, other evidence relating to the definition of marihuana. Nevertheless, it remained as evidence, and as the only evidence, as to what substance was proscribed by the statutes

forming the basis of the prosecution.

The fact that the statute defining marihuana is a federal statute, and thereby subject to judicial notice, does not detract from the fact that it was evidence in the case. It merely obviates the necessity of formal proof as a foundation for its admission into evidence.

When the request was made that the statute be judicially noticed and read to the jury as part of the defendant's case (JA 17) , the trial court should have granted the request, and failure to do so was error. This view is supported in 5 Wigmore on Evidence (Second Ed.) 571, where it is said:

§2568. Same (Effect of Judicial Notice) : (2) Notice must be requested; Pleading a Statute.

Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it. Upon this request, the Court is bound, it is sometimes said, to declare the fact noticed, or at least to make that investigation (Post. §2569) which it deems necessary. No doubt, in most instances, the rule of law has the plain consequence of compelling the judge to declare the dispensation; not to do so would be to err, precisely as under any other rule of law.....

It is no answer to say that the error was rendered harmless by the court's reading the statutory definition of marihuana as part of the charge to the jury. The defendant had embarked upon a trial strategy whereby the statutory definition would go to the jury on the heels of the chemist's testimony, and the defendant's

requested instruction would follow both of them. This strategy was lawful and, whether good, bad, or indifferent, the defendant was entitled to seek benefit from it. This strategy was crippled by the erroneous ruling of the trial court, and the error was prejudicial.

While the trial court's charge to the jury did recite the statutory definition of marihuana (JA 19) , and did include a statement of the government's burden of proof on "each essential element of the offense charged" (JA 20) , the trial court did not delineate for the jury the elements of the crimes charged, although requested so to do (JA 22) . The trial court refused (JA 18) to give defendant's Instruction Number One (JA 23) , which was submitted as a pertinent and correct statement of law related to the evidence in the case (JA 13, 14, 15) .

During the course of the trial, the issue was drawn as to the identity of the substance examined by the chemist (JA 7-10) . It is our contention that the case should not have gone to the jury (JA 11) . Being overruled in this contention, however, we submit that we were entitled to go to the jury under an instruction which fairly set out our theory of the case as developed by the evidence. It is immaterial whether the evidence was elicited by direct or cross-examination, or which party produced the evidence. The cross-examination of the chemist was evidence in the case. We claimed that his evidence did not satisfy the statutory definition of marihuana, and defendant's Instruction Number One was submitted on that basis. The requested instruction was amply supported by the testimony of the government chemist, and would have been more fully supported if the trial court had judicially noticed the statutory definition of marihuana and permitted it to be read to the jury as part of defendant's case as requested (JA 17) and as previously agreed by the court (JA 13) .

This Court has very recently (November 18, 1958) ruled, in the case of Levine vs. U. S. (No. 14,442) 104 US App DC ____; 261 F2 747 ; that is not sufficient for a trial court to merely give a charge which is a correct statement of principles of law, and that it is reversible error for the court to refuse, on request, to instruct also as to defendant's theory of the case. We were entitled to put before the jury, by way of instruction, our theory that the overall testimony of the chemist did not indicate that he had examined prohibited marihuana within the purview of the statutory definition. The trial court's denial of this request was prejudicial error.

By virtue of the foregoing, the appellant urges that the judgment of the District Court be reversed.

Respectfully submitted:

J Robert Walsh,
Counsel For Appellant

08

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14874

WALTER SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

OLIVER GASCH,

United States Attorney.

CARL W. BELCHER,

NATHAN J. PAULSON,

Assistant United States Attorneys.

United States Court of Appeals

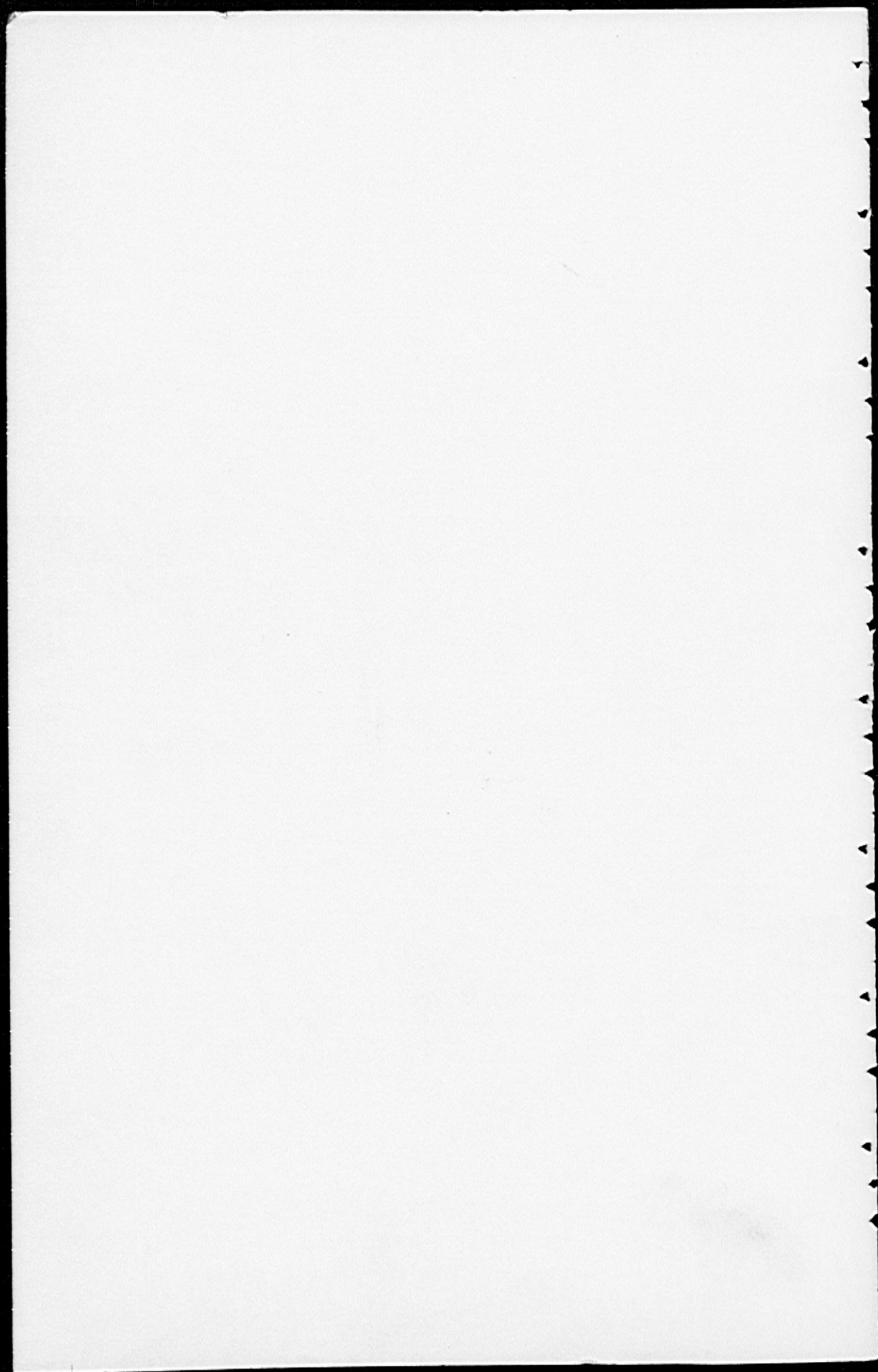
For the

District of Columbia Circuit

FILED MAR 24 1959

Joseph W. Stewart

CLERK



QUESTIONS PRESENTED

The facts disclose that appellant sold several cigarettes to a police officer which cigarettes were microscopically examined and chemically tested from which an expert witness arrived at the conclusion that they contained marihuana. The separable statutes involved consisted of the offenses and the definition of marihuana which contained an exception. In the opinion of the appellee, the following questions are presented:

1. Was not the burden of proof upon the appellant to adduce evidence that he came within the exception when the prosecution proved a prima facie case of violations of the statute?

2. Did the trial court commit error by refusing to instruct the jury in the language and order suggested by appellant where the court did instruct in the language of the statute?

(x)

THEORY OF THE EARTH

The theory of the earth is a branch of geology which deals with the origin and development of the earth and its various parts. It is a science which seeks to explain the processes which have shaped the earth and its features. The theory of the earth is based on the study of the earth's structure and its history. It is a science which seeks to explain the processes which have shaped the earth and its features.

The theory of the earth is a branch of geology which deals with the origin and development of the earth and its various parts. It is a science which seeks to explain the processes which have shaped the earth and its features. The theory of the earth is based on the study of the earth's structure and its history.

The theory of the earth is a branch of geology which deals with the origin and development of the earth and its various parts. It is a science which seeks to explain the processes which have shaped the earth and its features. The theory of the earth is based on the study of the earth's structure and its history.

INDEX

	Page
Counterstatement of the case.....	1
Statutes involved.....	4
Summary of argument.....	5
Argument:	
I. The burden of proving that possession of the marihuana was legal, was upon appellant.....	6
II. The court's instructions were proper.....	8
Conclusion.....	9

TABLE OF CASES

<i>Ballard v. United States</i> , 99 U.S. App. D.C. 101, 237 F. 2d 582 (1956).....	8
<i>Gray v. United States</i> , — U.S. App. D.C. — (decided Oct. 3, 1958, No. 14,359).....	7
<i>Maynard v. United States</i> , 94 U.S. App. D.C. 347, 215 F. 2d 336 (1956).....	8
<i>McKelvey v. United States</i> , 260 U.S. 353 (1922).....	6
<i>Morrison v. California</i> , 291 U.S. 82 (1933).....	8
<i>Peckham v. United States</i> , 93 U.S. App. D.C. 136, 310 F. 2d 693 (1953).....	7
<i>United States v. Bayer</i> , 331 U.S. 522 (1947).....	8
<i>United States v. Chiarelli</i> , 192 F. 2d 58 (7 Cir. 1952), cert. denied, 342 U.S. 913, reh. den., 342 U.S. 950.....	7
<i>United States v. Cook</i>	9
<i>United States v. Holmes</i> , 187 F. 2d 222 (7 Cir. 1941), cert. denied, 341 U.S. 948, reh. denied, 342 U.S. 843.....	7
<i>United States v. Turner</i> , 266 Fed. 248 (1920).....	8
<i>Williams v. United States</i> , 78 U.S. App. D.C. 147, 138 F. 2d 81 (1945).....	7

INDEX

1	.....
2	.....
3	.....
4	.....
5	.....
6	.....
7	.....
8	.....
9	.....
10	.....
11	.....
12	.....
13	.....
14	.....
15	.....
16	.....
17	.....
18	.....
19	.....
20	.....
21	.....
22	.....
23	.....
24	.....
25	.....
26	.....
27	.....
28	.....
29	.....
30	.....
31	.....
32	.....
33	.....
34	.....
35	.....
36	.....
37	.....
38	.....
39	.....
40	.....
41	.....
42	.....
43	.....
44	.....
45	.....
46	.....
47	.....
48	.....
49	.....
50	.....
51	.....
52	.....
53	.....
54	.....
55	.....
56	.....
57	.....
58	.....
59	.....
60	.....
61	.....
62	.....
63	.....
64	.....
65	.....
66	.....
67	.....
68	.....
69	.....
70	.....
71	.....
72	.....
73	.....
74	.....
75	.....
76	.....
77	.....
78	.....
79	.....
80	.....
81	.....
82	.....
83	.....
84	.....
85	.....
86	.....
87	.....
88	.....
89	.....
90	.....
91	.....
92	.....
93	.....
94	.....
95	.....
96	.....
97	.....
98	.....
99	.....
100	.....

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14874

WALTER SMITH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On September 15, 1958, there was filed in the District Court a two count indictment charging appellant with violation of 26 U.S.C. 4742(a) and 4744(a).¹ On September 19, 1958, appellant, with court appointed counsel present, entered a plea of not guilty. On October 27, 1958, appellant was found guilty as charged by a jury. On December 12, 1958 he was sentenced to a term of imprisonment for a term of five years on count one and from twenty months to five years on count two, said sentences by the counts to run concurrently with each other and with a sentence heretofore imposed in Criminal case 373-58. This appeal followed (J.A. 1, 2).

Herbert Blanco, a member of the Metropolitan Police Force testified that on August 3, 1958 appellant asked him "if (he) wanted anything" to which he replied "I want a nickel's worth,

¹These are the marihuana statutes prohibiting the sale thereof except in pursuance of a written order and the acquisition, transportation or concealment of marihuana, without paying the tax thereon.

meaning I wanted \$5.00 worth of marihuana" (J.A. 4). He testified that "a nickel's worth" is "the jargon" used by marihuana smokers. He further stated that pursuant to his request, appellant gave him four hand-rolled cigarettes in exchange for \$5.00 (J.A. 4). Appellant had no written order form, nor were there any tax stamps on the cigarettes (J.A. 4). Upon cross-examination he denied that appellant had sold him "asthmador cigarettes" (J.A. 4).

William P. Butler testified that he had been employed by the Internal Revenue Service of the Treasury Department as a chemist for a period of seven years (J.A. 4, 5). Counsel stipulated as to his qualifications as a chemist (J.A. 5). He stated that when he received Government Exhibit 2 for identification, which was a sealed envelope containing a sealed brown coin envelope, he opened both envelopes and found therein four hand-rolled cigarettes (J.A. 5); that he took a portion of the contents of each of the four cigarettes, analyzed them and found that each one of the four cigarettes contained marihuana (J.A. 6); that he examined the portion chemically and microscopically (J.A. 7); that a chemical analysis disclosed that the reagent used rendered a color which only appears when applied to marihuana (J.A. 7). Upon cross-examination, he testified that the test used did yield a positive color which appears only with the presence of tetrahydracannabinol, and that the latter chemical is found only in marihuana (J.A. 8). He testified that he had extensive training in Biology (J.A. 9), and that "in every instance of an offense involving marihuana", a microscopic examination was also performed (J.A. 9). He reiterated that tetrahydracannabinol does not exist in any other plant but in marihuana (J.A. 10); that the existence of tetrahydracannabinol would be found in the stalks, but not to as great an extent as in the leaves and that he did not do any quantitative (analysis) in this instance (J.A. 10). Appellant moved for judgment of acquittal upon the ground that the chemist's testimony did "not purport to show that the matter which he examined is beyond a reasonable doubt prohibitive matter under the statutes"; that the form and substance of his conclusion was that he detected one substance which is found in

all portions of the plant and that it was impossible to determine from his analysis what part of the plant he examined (J.A. 11, 16).

Appellant testifying in his own behalf stated that although he knew that Officer Blanco had requested marihuana from him, all that he had given him was "asthmador cigarettes" (J.A. 12). He admitted that he had been convicted for procuring women for the purposes of prostitution (J.A. 15). Upon the completion of the testimony, appellant asked the court to judicially notice and read 26 U.S.C. 4761(2) to the jury and then follow it with the instruction which he submitted to the court. The court advised appellant that he would judicially notice the statute and would read it to the jury. He refused to grant the instruction in the terms submitted (J.A. 13). The court advised appellant that he could argue that the chemist's evidence did not conform to the requirement of the statute and that in effect, appellant's instruction was "trying to do the same thing there that the statute does" (J.A. 14).

In rebuttal, Officer Paul testified that within a half hour after appellant's arrest, the latter admitted that he had used marihuana previously (J.A. 18). Appellant submitted the following instruction:

YOU ARE INSTRUCTED that the Congress has very carefully defined marihuana, the alleged obtaining and transfer of which by the Defendant forms the basis for the prosecution of this case.

The following parts of the marihuana plant, or Cannabis Sativa, as it is more properly called, are not subject to tax, and may be obtained and transferred without criminal consequences:

1. Mature stalks of the plant, and any compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom).

2. Fiber produced from such stalks, and any compound, manufacture, salt, derivative, mixture, or preparation of such fiber.

3. Oil or cake made from the seeds of the plant, and any compound, manufacture, salt, derivative, mixture, or preparation of such oil or cake.

4. Sterilized seeds of such plant, which are incapable of germination.

Accordingly, unless you find beyond a reasonable doubt that the Defendant, Walter Smith, obtained and transferred to Officer Blanco parts of the plant, Cannabis Sativa, other than those I have just mentioned, you must find the Defendant not guilty.

The court denied said instruction (J.A. 18) and proceeded to charge the jury. His charge included the following: A reading of the indictment; a reading of the statute defining marihuana; the statutes involved upon which the indictment was based; the presumption of innocence; the Government's burden of proof, reasonable doubt, previous conviction of a crime, credibility of the witnesses, and a repetition of the burden of proof.

STATUTES INVOLVED

Title 26, United States Code, Section 4742(a), provides:

(a) *General Requirement.*—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary of his delegate.

Title 26, United States Code, Section 4744(a), provides:

(a) *Persons in General.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable

notice and demand by the Secretary or his delegate, to produce the order for required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

Title 26, United States Code, Section 4761(2), provides:

(2) *Marihuana*.—The term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

SUMMARY OF ARGUMENT

The separable statutes involved consist of the offenses and the definition of marihuana. The latter statute contains an exception. This Court has held in construing similar statutes involving abortion and heroin that the burden of proof is upon appellant to prove that he comes within the exception. Since a prima facie case was produced by the prosecution by testimony of the sale plus the conclusion by an expert witness that upon a microscopic examination and chemical test, the cigarettes contained marihuana, the presumption of guilt contained in the statute prevailed unless and until appellant could prove otherwise. His testimony failed in that respect.

A reading of the statute by the trial judge was sufficient. He is not required to instruct the jury in the language or order suggested and requested by the defense. The theory of the defense was clearly put to the jury by appellant's testimony. The triers of the fact chose not to believe a previously convicted felon.

ARGUMENT

I. The burden of proving that possession of the marihuana was legal, was upon appellant

The prosecution clearly proved that the cigarettes sold to the police officer by appellant contained marihuana. The testimony disclosed that portions of the cigarettes were both microscopically examined and chemically tested. Based upon the witness' qualifications as an expert in the field of chemistry and botany, the conclusion drawn by him from such endeavors was that the cigarettes contained the contraband. Under 26 U.S.C. 4744(a), the "possession of *any* marihuana" is presumptive evidence of guilt. The evidence disclosed that appellant had the cigarettes in his possession before he sold them to the police officer. By his own testimony he stated that he had sold the cigarettes to the police officer but attempted to explain them away by insisting that they were cigarettes made from tobacco which had been obtained from "asthmador" cigarettes which he smoked for his health and which he had rerolled in cigarette paper. His testimony put in direct issue the question of the contents of the cigarettes. The jury chose not to believe his explanation.

It has long been established that where there are exceptions in a criminal statute, the burden of proof is upon the defendant to assert and prove that he falls within the exception. In *McKelvey v. United States*, 260 U.S. 353, 357 (1922), the Supreme Court stated:

One ground of objection is that the indictment contains no showing that the accused were not within the exception made in the proviso to § 3. This is not a valid ground. By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere, and that it is incumbent on one who relies on such an exception to set it up and establish it. [Citations omitted.]

In the District of Columbia, the aforesaid rule has been followed in construing the abortion statute. See *Peckham v. United States*, 93 U.S. App. D.C. 136, 310 F. 2d 693, 697 (1953); *Williams v. United States*, 78 U.S. App. D.C. 147, 138 F. 2d 81, 82 (1943). In the latter case, this Court stated:

We therefore, conclude that the exception in the abortion statute before us was intended to furnish the defendants an opportunity for justification and not to be part of the description of the offense itself.

The same contention was raised in appeals concerning the heroin statutes. *United States v. Chiarelli*, 192 F. 2d 528 (7 Cir. 1952), *cert. den.* 342 U.S. 913, *reh. den.* 342 U.S. 950; *United States v. Holmes*, 187 F. 2d 222 (7 Cir. 1951), *cert. denied*, 341 U.S. 948, *reh. denied* 342 U.S. 843 and *Gray v. United States*, — U.S. App. D.C. — (decided October 3, 1958, No. 14359). In the *Chiarelli* case, *supra*, the Court stated (p. 531):

Defendants say that each Count of the indictment alleges "a quantity of a certain derivative of opium, to wit: 177 grains of heroin" and that no proof of the quantity is made by the government. Defendants apparently attempt to bring themselves within the scope of Sec. 2551(a) of Title 26, U.S.C., which exempts from operation of Sec. 2553(a) the possession of one-eighth of a grain or less of heroin. A defendant claiming to come within that exemption has the burden of so showing.

In the *Holmes* case, *supra*, the Court states (p. 224):

* * * but in addition we think the burden of proof was on the defendant to show that he came within the exemption of that statute Title 26 § 2551(a).

The rule is well stated in 7 *Fifths Old Grand-Dad Whiskey v. United States*, 10 Cir., 158 F. 2d 34, 36 *certiorari denied*, 330 U.S. 828, 67 S. Ct. 870, 91 L. Ed. 1277:

Furthermore, when a criminal statute sets forth an exception, which exception is not part of the crime, but operates to prevent an act otherwise included in the statute from being a crime, the burden is on the defend-

and to bring himself within the exception. [Citations omitted.]

In the *Gray* case, *supra*, the point, among others was briefed and argued but this Court denied the appellant relief. To the same effect see *United States v. Turner*, 266 Fed. 248 (1920) where a permit was required to transport whiskey and the burden of proof was held to be on the defendant to prove that he had such a permit and not upon the government to prove the negative.²

II. The Court's instructions were proper

The trial court is not required to instruct in the language selected and suggested by counsel. *Ballard v. United States*, 99 U.S. App. D.C. 101, 237 F. 2d 582 (1956). In the instant case counsel submitted an instruction requiring the court to rephrase the statutory definition of the term marihuana. This the court refused to do; but, instead read to the jury the statute itself. This it may do for where the law governing a case is expressed in a statute, the court in its charge should generally use the language of the statute. *Maynard v. United States*, 94 U.S. App. D.C. 347, 215 F. 2d 336 (1954). The Supreme Court has laid down the broad general principle that the trial judge is better qualified to determine whether the jury should be given additional definitions and that the matter therefore must rest within his sound discretion. *United States v. Bayer*, 331 U.S. 532 (1947). In the instant case, we submit that the trial judge did not abuse his discretion, for the definition as set forth in the statute is clear.

² Cf. *Morrison v. California*, 291 U.S. 82 (1933) where the Supreme Court stated:

"The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall prove enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to a hardship or oppression." In the instant case, no claim has been made that hardship or oppression were present. The presumption following proof of possession, we submit, was not overcome by appellant's explanation.

Appellant strongly emphasizes that the trial judge refused to set forth his theory of the case by refusing to read the statute to the jury prior to the court's charge, and then follow it with his proposed instruction. The court advised appellant that he could argue that the evidence did not conform to the requirement of the statute (J.A. 12, 14).

As we read the record, the theory of the defense as stated by appellant on the witness stand was that he had never sold marihuana to the police officer; that because of the requests made to him he sold for five dollars the contents of several "asthamador" cigarettes which he removed from their original wrapping and which he rerolled into other cigarette paper. He maintained that they contained no marihuana. It can only be inferred that his claim was that after he had bilked his purchaser he was "framed". The issue raised by the defense was clear. The jury chose not to believe appellant. The government proved a prima facie case by the testimony elicited from all the witnesses plus the cigarettes received in evidence and seen by the jury. *United States v. Cook* (Br. p. 9) relied upon by appellant is in accord with the fundamental principles set forth in the Morrison case cited in footnote 2 herein. A continuation of appellant's quotation sets forth that "if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused."

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

OLIVER GASCH,
United States Attorney.

CARL W. BELCHER,
NATHAN J. PAULSON,
Assistant United States Attorney.